No 123. is only accountable for the tack-duty; but found him accountable for the rents, crop 1741.

C. Home, No 211. p. 352.

1744. *July* 28.

ANDREW EDMONSTON of Ednem *against* ARCHIBALD and JAMES BRYSONS.

No 124.
A promise made by a tenant, who possessed by tacit relocation, to remove at the next ensuing term, while it was competent to the master to use a formal warning, and not resiled from till the term day, when no warning could be used, found binding upon the tenant.

ARCHIBALD BRYSON possessed the farm of Boonerton of Ednem several years, under the pursuer's father, by a verbal agreement; and after the late Ednem's decease, the pursuer, as apparent heir to his father, allowed the tenant to take in James Bryson his son, as sub-tenant in part of the farm.

In February and March 1744, the pursuer had several communings with them anent their giving more rent for the farm, which they refused; whereupon, as the time of warning was drawing near, he asked them, If it would be necessary for him to use a formal warning? To which Archibald, in the presence and hearing of his son, told the pursuer, that they would take no advantage of him, if he should not think fit to warn them away; and that it was not necessary for him to use any warning, and that they would remove at Whitsunday next. When the term came, they refused to remove, which obliged the pursuer to raise a process of removing, and *insist*, That as the Brysons had come under an express promise to the pursuer, to remove at Whitsunday last, which he offered to prove by their oath, they were bound thereby to remove accordingly, without any legal warning against them; and that it was not in their power to resile just upon the term-day, *rebus non integris*.

Pleaded for the defenders, That the pursuer being not yet infeft in the lands, could not insist in a removing; 2*do*, That a verbal promise to remove was not binding, but that parties might resile till it was put in writing; 3*tio*, That as the pursuer was not bound to let them go at Whitsunday, by accepting of a renunciation from them, it would be unequal to find them bound to remove while the pursuer was loose; 4*to*, A separate defence was made for James Bryson, that though he was present when his father made the promise, yet he gave no express consent thereto.

Answered to the *first* defence, That it was not competent to object to the pursuer's title, as the defenders acknowledged he was apparent heir to his father, from whom they received their possession; and that they had paid rent to him as such, which was such an acknowledgment of his right, as barred them from objecting thereto; neither was there any place for this objection here, seeing he was not insisting to remove the defenders, in consequence of any real right in the lands, but merely upon the express promise made by them to him. There could be no doubt the pursuer was entitled to continue his father's possession, and had a full right to his estate, barring, that his title wanted a

form of the law to complete it; and therefore he was certainly entitled to ask such a promise, and insist that the defenders having given it, were bound thereby. To the *second* defence, it was *answered;* That it was a maxim in our law, that promises were binding upon the party-promiser, according to the different subjects to which they are interposed. This being the general rule, the pursuer can see no reason why it should not apply to a promise by a tenant to remove from the possession of his farm. There are some cases indeed, which the law thinks of such moment as not to trust to naked words, such as the conveyance of the property of heritable subjects, and therefore, by constant practice, have required writ as a necessary solemnity to their perfection; but that exception will not apply to a tenant's removing from a farm, no law having required writ to be necessary in that case, it being only a temporary possession, and not of such consequence as the transmission of heritable rights. These principles apply strongly to the case in hand, where there was no written tack betwixt the parties, nor so much as a verbal one, but the possession only continued by tacit relocation; and any doubt that can arise upon a question of this kind, must only be where there is a written tack betwixt the parties; as it may be there argued, that a tack constituted by writing ought only to be taken away by writing, or a formal warning; *unumquodque eodem modo dissolvitur*, &c. And by this rule, a verbal promise to remove ought to be sufficient, where the tack was only verbal. See Craig, Lib. 2. Dieg. 9. § 11. No 124.

The statute which introduces the form of warning, never intended to take from the parties the power of dispensing with these legal formalities. But supposing, for argument's sake, the defenders could have resiled, still they ought to have done it *rebus integris*, so as to leave each party, at the time of resiling, in the same situation in which they were when the agreement was made; but whenever the case is otherwise, and one party has been lulled asleep by the other's promises, till it is out of his power to do what he might otherwise have done, to procure a legal remedy in place of a voluntary one, that is a kind of fraud which no law will ever favour; and here the defenders did not show the least repentance of their promise till the term-day, when it was too late for the pursuer to use a legal warning.

To the *third* defence it was *answered*, That the pursuer always acknowledged, that he accepted of the renunciation of their farm, which bound him to the defenders, 24th January 1734, Carlyle, (mentioned in No 237. p. 12415.)

With respect to the *last* defence, it was offered to be proved by the defenders' oaths, That James Bryson was present with his father at the communings with the pursuer; and that he had heard his father promise to remove, without objecting thereto.

Lastly, There was no need of making any agreement with James the son, because he was only sub-tenant to his father; therefore it was unnecessary to use any warning against him, because a warning or agreement with the father was

No 124. sufficient against the son, his right depending on his father's, the principal tenant.

The Lords remitted to the Lord Ordinary to take the defenders' oaths.

Fol. Dic. v. 4. p. 225. C. Home, No 274. p. 444.

*** Kilkerran's report of this case is No 237. p. 12415. *voce* Proof.

1771. *January* 24.

The Earl of Eglinton *against* Janet Fulton, Tenant in Dreghorn.

No 125.
Warning held to be necessary, where the tack contained a clause to remove without it.

Janet Fulton possessed the lands of Dreghorn by a lease for 19 years from her entry; which to the arable lands was at Martinmas 1750, and to the grass at Beltan, or May-day, 1751. By this tack it was agreed, "that she and her foresaids shall flit and remove themselves forth and from their said possessions at the ish and expiration of this tack, without any warning or decreet of removing to be obtained against her for that effect."

Upon the 12th of April 1770, the Earl of Eglinton gave her a charge to remove from the arable lands immediately, and from the grass at May-day first to come. This was within little more than *thirty* days of the term of Whitsunday 1770, within eighteen days of May-day, when the tack expired as to the grass, and *five* months after Martinmas 1769, the term of removal from the arable lands. Janet Fulton suspended; and the Lord Ordinary "having considered the debate, with the clause in the tack charged on, repelled the reasons of suspension."

The suspender, in a reclaiming petition, *pleaded*;

1*mo*, The charge, in the present instance, was irregular; and notwithstanding the clause in the tack, she was not bound to remove. It was the express opinion of Lord Stair, B. 2. T. 9. § 38. that a clause, binding tenants to remove without warning, could not be put in execution after the term was elapsed, and the tenant allowed to possess by tacit relocation. A clause to remove without warning had no other effect than to supersede the intricate solemnities of a regular removing; but an intimation forty days before Whitsunday was still indispensable, whenever the tenant had been allowed to possess beyond the precise day of removal stipulated in the tack; 2d December 1742, Bartlet *contra* Stewart, No 123. p. 13882.

2*do*, Though, in the present case, there were two terms of removal, yet Whitsunday was that always regarded; and when two terms were specified, it was the first in date by which the time of warning or any other species of removal was regulated. Lord Bankton, B. 2. T. 9. § 56.; 15th June 1631, Ramsay *contra* Weir, No 97. p. 13857.; 19th February 1740, Hay *contra* Kerse, No 80. p. 13837. Hence, as the charge made no intimation forty days before